STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 24, 2006
v	No. 251532 Kent Circuit Court
ROBERT RANDALL ROOT, Defendant-Appellant.	LC No. 01-011830-FH

Before: Zahra, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a), and one count of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(a). He was sentenced to concurrent terms of five to 15 years' imprisonment for each CSC III conviction, and 12 to 24 months' imprisonment for his CSC IV conviction. This case arose when defendant, while a volunteer at a seasonal haunted house, sexually assaulted two 13-year-old female volunteers, AW and SV. Defendant raises numerous issues and sub issues on appeal, none of which we find persuasive. We affirm.

We first address defendant's claim that the prosecution presented insufficient evidence to find him guilty beyond a reasonable doubt of CSC III and CSC IV. We disagree. We review a challenge to the sufficiency of the evidence in a bench trial de novo and in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Sherman-Huffman,* 241 Mich App 264, 265; 615 NW2d 776 (2000). The "standard of review is deferential, and requires a reviewing court to draw all reasonable inferences and resolve credibility conflicts in support of the verdict." *People v Nowack,* 462 Mich 392, 400; 614 NW2d 78 (2000); *People v Terry,* 224 Mich App 447, 452; 569 NW2d 641 (1997).

A person is guilty of third-degree CSC if the person engages in sexual penetration with another person, accomplished under certain aggravating circumstances, including if that other person is between the ages of thirteen and sixteen. MCL 750.520d(1)(a). "Sexual penetration" includes cunnilingus and fellatio. MCL 750.520a(o).

It is undisputed that victim SV was between the ages of thirteen and sixteen at the time of the incident. SV testified that following the October 25 show, defendant took her to a room in

the maze area of The Haunt and French-kissed her, removed her costume, lifted her onto a ledge and performed cunnilingus and may have digitally penetrated her vagina as well. She also testified that after defendant stopped and lifted her off the ledge, he pulled himself onto the ledge and forced his penis into her mouth. She also told nurse examiner Susan Reiter that defendant had licked her chest. Physical evidence of the incident included a lab report indicating that defendant's DNA matched the DNA found in secretions on SV's breast. A vaginal swab indicated the presence of saliva or amylase, and matched SV's DNA but not defendant's. A physical exam revealed that SV had a two-millimeter tear in the posterior fourchette of her vagina and a small amount of blood below her clitoris, which Reiter testified that she has seen before in sexual assault cases. Reiter testified that the tear was consistent with digital penetration and with SV's statements about her assault.

Additionally, defendant confessed to committing an oral/vaginal penetration and an oral/penile penetration on SV during his interview with police. At trial, defendant admitted that he confessed, but stated that he felt coerced and forced to do so, explaining that he confessed because he thought he would be able to go home and take care of his girlfriend, who had threatened to commit suicide when he called her during a break in his interview with police. However, Detective Turnes and former officer Noordeloos both testified that defendant did not call his girlfriend until well after making his confession.

Defendant argues that SV's description of extensive physical contact is insufficient in the context of the defense witnesses' testimony demonstrating the implausibility of the allegations. These arguments challenge SV's credibility and are a matter of weight, rather than sufficiency, of the evidence. See *People v Fletcher*, 260 Mich App 531, 561-562; 679 NW2d 127 (2004). The testimony of a criminal sexual conduct victim need not be corroborated under MCL 750.520e. MCL 750.520h. The trial court was entitled to judge the credibility of the witnesses and determine the weight to give to the evidence. *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). Here, SV's testimony clearly established two acts of sexual penetration. The trial court stated its belief that SV testified truthfully, and indicated both at trial and at the *Ginther*[1] hearing that it found the officers' testimony regarding defendant's confession more credible than defendant's testimony. This Court will not interfere with the trier of fact's role of determining the weight of the evidence or deciding the credibility of the witnesses, and all conflicts in the evidence must be resolved in favor of the prosecution. *Fletcher*, *supra* at 561-562. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to allow a rational trier of fact to find that the elements of third-degree CSC were proven beyond a reasonable doubt.

Defendant was also convicted of CSC IV. A person is guilty of criminal sexual conduct if the person engages in sexual contact with another person and that other person is at least 13 years of age but less than 16 years of age, and the actor is five or more years older than that other person. MCL 750e(1)(a). MCL 750.520a(n) provides that "sexual contact" includes "the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purposes

[1] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

of sexual arousal or gratification." See *People v Piper*, 223 Mich App 642, 647; 567 NW2d 483 (1997). "'Intimate parts' includes the primary genital area, groin, inner thigh, buttock, or breast of a human being.'" MCL 750.520a(c).

AW testified that during the show, she and defendant were in a corner when defendant kissed her, touched her rear end, tried to put his hands down her pants, and lifted her shirt and bra, and she felt him lick her chest. There were no direct witnesses to the incident, and there was no physical evidence of it. However, as we previously noted, defendant confessed to committing the CSC IV on AW, but denied the actions and disputed his confession at trial.

Defendant argues that several pieces of evidence presented at trial demonstrate the implausibility of AW's version of the incident. Defendant's arguments again challenge the victim's credibility and are a matter of weight, rather than sufficiency, of the evidence. *Fletcher*, *supra* at 561-562. We find that there was sufficient evidence to allow a rational trier of fact to find that the elements of fourth-degree CSC were proven beyond a reasonable doubt.

We next address defendant's claim that the trial court clearly erred in its findings of fact regarding scientific evidence and that its findings resulted in a lowering of the prosecutor's burden of proof. We disagree. We review the trial court's findings of fact for clear error. MCR 2.613(C); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A finding of fact is clearly erroneous when, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*.

Defendant argues that the trial court's factual findings indicated a misunderstanding of the scientific evidence. Evidence at trial showed that amylase was present in SV's breast and vaginal swabs. Defendant's DNA matched the DNA found in the breast swab, but DNA was not present in the vaginal swab. Defense expert Dr. Theodore Kessis, and the prosecution's expert, Ann Hunt, of the Michigan State Police Biology DNA Unit testified the amylase in the vaginal swab was either from saliva or from SV's pancreatic amylase. The trial court's statement that, "I can't see how pancreatic fluids from the defendant would wind up on [SV] and nothing in the evidence gives us any reason to believe that that's what likely happened," merely reflects that the evidence showed that the amylase in SV's vaginal swab could only be from defendant's and/or SV's saliva, or as proposed by Kessis, SV's pancreas through her anus. We find that the trial court did not clearly err in regard to the amylase evidence.

Further, when considered in the context of the trial court's discussion of the scientific evidence presented at trial, the contested statement demonstrates that the trial court considered the testimony of both experts as well as all of the other evidence presented at trial, in reaching its decisions on its factual findings and legal conclusions. Defendant's argument that the statement indicates that trial court misapplied the evidence is without merit.

Defendant also argues that the trial court inferred the oral/penile and oral/vaginal contact merely from the presence of defendant's DNA in SV's breast sample, and thus did not hold the prosecutor to its burden of proof beyond a reasonable doubt. However, our review of the record indicates that the trial court carefully considered all of the testimony and evidence in the present case, and weighed credibility before convicting defendant on all counts charged. Additionally, defendant's argument that the trial court improperly used the victims' allegations as corroborative of each other has no merit because the similarity of the descriptions of the acts

against the respective victims was a reasonable basis on which the court could assess the credibility of AW and SV.

We next address defendant's claim that he was denied a fair trial because the police investigation in the present case was inadequate and because his interrogation was not recorded. We disagree. Because defendant did not preserve this issue by raising it before the trial court, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Our Supreme Court has held that the prosecutor and the police do not have a duty to investigate on behalf of a defendant, or to seek and find exculpatory evidence. *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 (1995); *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997). The prosecutor and the police were not obligated to investigate the present case more thoroughly. Additionally, defendant's argument based on the police department's failure to tape record or videotape his interrogation fails because the United States and Michigan Constitutions do not require that electronic recordings be made of custodial interrogations. *People v Geno*, 261 Mich App 624, 628; 683 NW2d 687 (2004). Further, defendant's reliance on *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), is misplaced because here, defendant has not alleged that the prosecutor possessed or sought to suppress favorable evidence; rather, defendant is alleging that inadequate investigation occurred. We also find that defendant's reliance on *People v Jordan*, 23 Mich App 375, 385-389; 178 NW2d 659 (1970), is misplaced. *Jordan* addressed whether testing of a handkerchief was required to establish a foundation for its admission into evidence, not whether the prosecutor or the police had a duty to have the handkerchief tested. *Id*. at 385-389.

Defendant also argues that the police failed to preserve potentially useful evidence. In *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988), the United States Supreme Court held that "unless a criminal defendant can show bad faith on the part of police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id*. at 58. However, defendant is unable to demonstrate anything more than the possibility that the preservation of evidence could have exonerated him, and there is no indication of bad faith on the part of the police in the present case. Further, defense counsel exploited the weaknesses in the police investigation on cross-examination, and during his closing argument. When a defendant attempts to use an alleged error to his advantage at trial, this Court will not allow him to use the same error as grounds for reversal on appeal. *People v Baines*, 68 Mich App 385, 388-389; 242 NW2d 784 (1976). Defendant has not demonstrated plain error.

We next address defendant's claim that the prosecutor committed misconduct by withholding discovery material from the defense. We disagree. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Because the present claims of prosecutorial misconduct are unpreserved, the issue is reviewed for plain error. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). To avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights in that they affected the outcome of the proceedings. *Id*.

Defendant specifically argues that prosecutorial misconduct deprived him of "discoverable material information that was directly pertinent to the reliability of scientific

testing and to the issue of whether cross-contamination occurred." In support, defendant cites *Brady v Maryland*, *supra*. In *Brady*, the United States Supreme Court held that "suppression by the prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id*. at 87. To establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *People v Cox*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 250773, issued October 18, 2005); *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

Defendant has not established a *Brady* violation because he has not demonstrated that the evidence was exculpatory, that the prosecution possessed the requested material and suppressed it, and that its disclosure would have been outcome determinative. Defendant bases this issue entirely on speculation of what the missing data "could" do. Kessis testified that he could not rule out the possibility of cross-contamination because, based on the records he received, he *presumed* that the samples were tested in the same time and space. No evidence has been presented that cross-contamination actually occurred. Defendant has not demonstrated plain error. Further, defendant is unable to show prejudice that deprived him of a fair trial.

We next address defendant's claims that he was denied the effective assistance of counsel. We disagree. The denial of effective assistance of counsel is a mixed question of fact and constitutional law. *LeBlanc*, *supra* at 579. These are reviewed, respectively, for clear error and de novo. *Id.*

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578. To establish ineffective assistance, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id*. at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). A defendant must overcome the strong presumption that counsel's performance was sound trial strategy. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant argues that defense counsel was ineffective because counsel did not meaningfully challenge the use of defendant's confession at a *Walker*[2] hearing. Defendant argues that his confession was coerced, and would have been suppressed if a *Walker* hearing had been held.

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

The United States and Michigan Constitutions guarantee a right against self-incrimination. US Const, Am V; Const 1963, art 1, sec 17. This right protects a defendant from being compelled to testify against himself or to provide evidence of a testimonial nature. *Geno, supra* at 628. A defendant's statement made during a custodial interrogation is inadmissible unless he has voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). A confession or waiver of constitutional rights requires that the statement be made without "intimidation, coercion, or deception." *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003).

This Court looks to the totality of the circumstances surrounding the making of a statement to determine whether it was freely and voluntarily made. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

We find that defendant knowingly, intelligently and voluntarily waived his *Miranda* rights. That defendant signed a card waiving his *Miranda* rights before his interview with police is undisputed. However, defendant, Detective Turnes and Officer Noordeloos disputed the circumstances surrounding defendant's confession at trial. In its findings following the trial and the *Ginther* hearing, the trial court concluded that defendant's testimony was less credible than the officers' were. The trial court is in "the best position to assess the crucial issue of credibility." *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000); *Akins*, *supra* at 566. This Court defers to the trial court's assessment of credibility. MCR 2.613(C).

Because defendant's statements were voluntary, defense counsel's failure to pursue a *Walker* hearing before trial did not constitute ineffective assistance. A claim of ineffective assistance of counsel cannot be based on a futile motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). We also find a strategic element to defense counsel's decision not to further pursue a *Walker* hearing. Defense counsel opined that an argument for suppression based on coercion would not have prevailed for several reasons, and testified that he knew that Turnes was inexperienced at testifying, and decided not to proceed with the motion as a strategic measure because he did not want to give her "a dress rehearsal." Defendant cannot overcome the presumption of sound trial strategy.

Defendant argues that defense counsel's performance was ineffective because of a failure to insist on the prosecutor's compliance with the defense's discovery request, to have Kessis testify in person, to explore the issue of cross-contamination and stipulating to the admission of DNA evidence to avoid amylase testing.

In regard to defense counsel's failure to insist on the prosecutor's compliance with the defense's discovery request and failing to explore the issue of cross-contamination, we conclude that defendant is unable to show prejudice. As earlier addressed, defendant failed to establish a *Brady* violation because he has not demonstrated that the evidence was exculpatory, that the prosecution possessed the requested material and suppressed it, and that its disclosure would have been outcome determinative. Further, that no evidence had been presented that cross-contamination actually occurred. Therefore, defendant's arguments that defense counsel provided ineffective assistance because he failed to insist upon the prosecutor's compliance with the discovery request, and failed to explore the issue of cross-contamination of the evidentiary

and reference samples are without merit because defendant is unable to show prejudice that deprived him of a fair trial.

Defendant also argues that defense counsel provided ineffective assistance by failing to have Kessis testify in person on direct examination and in rebuttal, and stipulating to the admission of the DNA evidence on SV's breast swab. These decisions were sound trial strategy. Defense counsel indicated that he chose not to call Kessis in person because the DNA sample was robust and non-contaminated, and the testimony would substantiate that of the prosecution's expert. Defense counsel also indicated that he attempted to minimize the adverse effect of the DNA and amylase evidence by stipulating to the admission of the DNA evidence on the breast swab and hoping that the amylase issue would not be a major issue at trial. That the strategy failed does not constitute ineffective assistance of counsel. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). It is well settled that "this Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy, and ineffective assistance of counsel will not be found merely because a strategy backfires**.**" *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999).

Defendant also claims that defense counsel's performance was ineffective because he was inadequately prepared for trial, did not call some witnesses and failed to conduct vigorous cross-examination of key witnesses. The decision to call or question witnesses is presumed to be a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call or question witnesses, or present other evidence constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense, which might have made a difference in the outcome of trial. *Id.* This Court will neither substitute its judgment for that of defense counsel regarding trial strategy matters, nor will it evaluate counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant contends that the defense counsel should have called defense witnesses Martin, Wilcox, and Brubaker to testify at trial, rather than submitting their preliminary exam testimony to the trial court. We find that defense counsel's decision did not constitute ineffective assistance because it was a matter of trial strategy. Defense counsel explained that the decision was strategic, because the prosecutor was surprised when these witnesses were called at the preliminary exam, and was not prepared to question them. Additionally, these witnesses' testimony about defendant's whereabouts after the show on October 25 was considered by the trial court and did not deprive defendant of a substantial defense. Defendant cannot overcome the presumption of sound trial strategy.

We find that defense counsel's decision not to present the character witness testimony of Gary Starkweather, who would have testified to defendant's honesty, was also a matter of trial strategy. Defendant cannot demonstrate that defense counsel's failure to call Starkweather deprived him of a substantial defense that might have made a difference in the outcome of the trial.

Further, defendant's argument that defense counsel failed to adequately cross-examine Turnes on inconsistencies in her testimony, and failed to adequately highlight the discrepancies between Turnes' and Noordeloos' testimony about the content of defendant's confession is belied by the record. Defendant has not established that defense counsel's performance fell below an objective standard of reasonableness, and any failure to further cross-examine Turnes

did not deprive defendant of a substantial defense that might have affected the outcome of the trial.

We next address defendant's claim that nurse examiner Reiter's testimony and reports detailing the victims' accounts of the incidents were inadmissible hearsay. We disagree. We review an unpreserved evidentiary issue for plain error affecting substantial rights. *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is inadmissible except as provided by the rules of evidence. MRE 802. Statements made for purposes of medical treatment are admissible under MRE 803(4), and records "kept in the course of a regularly conducted business activity" are admissible under MRE 803(6). Defendant argues that Reiter was an agent of the police, because the victims were brought to the YWCA to be examined for evidence of sexual assault. Under MRE 803(4), the declarant must have the self-motivation to speak the truth to treating physicians in order to receive proper medical care, and the statement must be reasonably necessary to diagnose and treat the patient. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996); *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992).

We find that Reiter's testimony about the victims' statements to her was admissible under MRE 803(4). In *McElhaney*, this Court held that a complainant's statements allowed the physician's assistant to "structure the examination and questions to the exact type of trauma that the complainant had recently experienced." *McElhaney*, *supra* at 283, citing *Meeboer*, *supra* at 329. Likewise, in the present case, the record supports a conclusion that the information gathered from the victims was necessary to Reiter's diagnosis and treatment of them.

Defendant argues that the statements made to Reiter by AW and SV were not made for the purpose of medical treatment because no reasonably foreseeable medical treatment could be expected from Reiter's examination because it was conducted at the YWCA, which is not a medical facility. "Sexual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment." *McElhaney*, *supra* at 283, citing *Meeboer*, *supra* at 329. Reiter testified that the main purpose of her examination is to check for a sexual assault. However, the record demonstrates that diagnosis and treatment were a part of the examination, as Reiter recommended that both victims undergo counseling, and administered medication to one victim. We find that aiding a criminal investigation was not the sole purpose of Reiter's exams, and that the victims' statements to Reiter were admissible under MRE 803(4). We also find that Reiter's reports were admissible under MRE 803(6). See *McLaughlin*, *supra* at 651-652.

We note that in some situations, the identification of the assailant is necessary to a victim's medical diagnosis and treatment. See *Meeboer*, *supra.* However, any statements made to or recorded by Reiter that identified defendant as the assailant would be inadmissible under MRE 804(3) because defendant's identity was irrelevant to obtaining treatment and diagnosis. However, any error was harmless because the challenged testimony was cumulative of the victims' own trial testimony, in which they described the assaults and identified defendant as the person responsible for them. *McElhaney*, *supra* at 283; *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003). Additionally, Reiter's testimony was cumulative of Turnes' and

Noordeloos' testimony, and was cumulative to the results of the DNA testing. Defendant is unable to establish plain error affecting his substantial rights. Furthermore, defendant is unable to demonstrate that defense counsel's failure to object to Reiter's testimony and reports constituted ineffective assistance because defense counsel is not required to raise meritless or futile objections. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Defendant also argues that Reiter's testimony violated defendant's Sixth Amendment right to confrontation under *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). This argument fails because the victims testified at trial. See *Id*. at 68; *People v McPherson*, 263 Mich App 124, 132; 687 NW2d 370 (2004).

Defendant argues that Reiter improperly vouched for SV when she testified, "[m]y expert opinion is that what the young woman told me was what happened." Expert testimony is inadmissible to opine on the credibility of witnesses. *Franzek v Kerr Mfg Co*, 234 Mich App 600, 622; 600 NW2d 66 (1999). However, an expert's testimony, otherwise, unobjectionable, may address an ultimate issue to be decided by the trier of fact. MRE 704; *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993).

Reiter's statement responded to the prosecutor's question whether she had an opinion regarding the "history provided by [SV] and the findings that [Reiter] found in [her] physical examination." Although Reiter's response could be understood as merely conveying to the jury that SV's history was consistent with her findings, the statement may have been viewed as an improper expert opinion on SV's credibility. However, we need not reach the question whether this statement constituted an improper expert opinion on credibility because we conclude that any error in admitting the statement was harmless.

Here, SV testified at the preliminary examination and at trial where defense counsel extensively cross-examined her on the issue of her credibility. Further, there was overwhelming evidence of defendant's guilt presented at trial. Besides the testimony of the SV, which was consistent with the physical evidence collected by Reiter and the history that she provided to Reiter, there was evidence that defendant confessed that he performed oral sex on SV, put his mouth on her breast, kissed her, and that SV performed oral sex on him. Therefore, we conclude that Reiter's statement that, "[m]y expert opinion is that what the young woman told me was what happened," was harmless, and reversal is not required.

Defendant also argues that defense counsel provided ineffective assistance by failing to effectively cross-examine Reiter, AW, and SV. The record indicates that defendant is unable to establish that defense counsel's performance fell below an objective standard of reasonableness, and any failure to further cross-examine Reiter and the victims did not deprive defendant of a substantial defense or affect the outcome of the trial.

Defendant argues that the cumulative impact of defense counsel's deficiencies was prejudicial, and that he is entitled to reversal and a new trial. However, because we have not identified any errors warranting relief in defendant's numerous arguments supporting his claim that defense counsel provided ineffective assistance, reversal under the cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112; 128; 600 NW2d 370 (1999).

We next address defendant's claim that the trial court erred in scoring OV 13 because his three convictions, which arose from two separate incidents, do not constitute a criminal pattern of conduct. Although we review the trial court's factual findings at sentencing for clear error, this Court upholds the trial court's scoring of the sentencing guidelines if there is any evidence in the record to support it. *People v Babcock*,469 Mich 247, 264-265; 666 NW2d 231 (2003). A sentencing court has discretion in determining the number of points to be scored under an offense variable, if evidence on the record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision that lacks supporting evidence will not be upheld. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). The interpretation of the statutory sentencing guidelines and legal questions presented by the application of guidelines are subject to de novo review. *Babcock*, *supra* at 253.

The trial court did not abuse its discretion in scoring twenty-five points for OV 13 where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). The statute reads: "[f]or determining the appropriate points under this variable, *all* crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). [Emphasis added.] Additionally, in *People v Harmon*, 248 Mich App 522, 524, 532; 640 NW2d 314 (2001), this Court upheld a twenty-five point score for OV 13 based solely on concurrent convictions. Defendant's three concurrent felony convictions were sufficient to establish a pattern of felonious criminal activity to support a twenty-five point score for OV 13.

We last address defendant's claim that he is entitled to resentencing pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, in *People v Claypool*, 470 Mich 715, 731 n 14; 684 NW2d 278 (2004), our Supreme Court held that "the Michigan [statutory guideline sentencing] system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by a jury in violation of the Sixth Amendment." We have rejected the argument that *Claypool* is not binding on this Court. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004).[3]

Affirmed.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Janet T. Neff

[3] We note that on March 31, 2005, our Supreme Court granted leave to appeal in *Drohan*, limiting its review to whether *Blakely* and *United States v Booker*, 543 US __; 125 S Ct 738; 160 L E. 2d 621 (2005), apply to Michigan's sentencing scheme, 472 Mich 881 (2005), and that oral argument was heard in *Drohan* in November 2005.